

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 22, 2014 Session

JENNIFER BROADRICK v. TROY BROADRICK

Appeal from the Chancery Court for Williamson County
No. 40477 Timothy L. Easter, Chancellor

No. M2013-02628-COA-R3-CV – Filed April 29, 2015

Father and Mother were divorced in Kentucky. As part of the divorce, they entered into an agreed custodial arrangement that granted them equal time with their child. Both parties subsequently relocated to Tennessee and now live within sixty miles of each other. Mother filed a petition to register the Kentucky plan and modify residential parenting time. Following a trial, the Tennessee court concluded that a material change in circumstance had occurred and modification of the parenting schedule was in the child's best interest. In a new parenting plan, the court allocated Mother 246 days and Father 119 days of parenting time. Father appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and BRANDON O. GIBSON, J., joined.

Brad W. Hornsby and Heather G. Parker, Murfreesboro, Tennessee, for the appellant, Troy Broadrick.

Deana C. Hood, Franklin, Tennessee, for the appellee, Jennifer Broadrick.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

Troy Broadrick ("Father") and Jennifer Broadrick ("Mother"), who were divorced in Kentucky in 2009, have one child together. While still living in Kentucky, the parties

entered into an agreed order on May 19, 2011 (“Kentucky order”).¹ The Kentucky order included a shared parenting schedule, which gave each parent seven days of parenting time out of a fourteen-day period. Father worked on a rotating schedule, so the parties were required to coordinate a new itinerary every six weeks. The Kentucky order also addressed the parents’ intent to move to the greater Nashville, Tennessee area. Both parties relocated to Tennessee in 2011. Mother initially moved to Thompson’s Station, and then to Spring Hill, where the child was eventually enrolled in school. Father first moved to Gallatin, and then relocated to Berry Hill in 2012.

On December 16, 2011, Mother filed a petition to register a foreign decree and to modify the Kentucky order in the Williamson County Chancery Court. Mother alleged that there had been a material change in circumstance that required a change in parenting time. She claimed Father had an unpredictable work schedule, often outsourced his parenting responsibilities to his parents, and lived over one hour away from Mother and the child’s school. Mother also claimed that the lack of a set parenting schedule created inconsistency for the child.

Following Mother’s request for specific visitation, the trial court entered a temporary parenting schedule on March 6, 2012. This order provided that the parents would exercise parenting time for alternating seven-consecutive-day periods. On May 21, 2013, the trial court entered an order confirming its jurisdiction “over any matters involving the minor child as long as the minor child continues to reside in the State of Tennessee.”

Both Mother and Father submitted proposed parenting plans in July 2013. Father’s proposed parenting plan allocated 182.5 days of parenting time to each parent, which would be exercised in alternating seven-consecutive-day periods. Father did not propose a primary residential parent designation but did propose joint decision-making authority. Mother’s proposed parenting plan named herself as the primary residential parent and granted her 253 days and Father 112 days of parenting time. Mother’s proposal had Father exercising parenting time every other Sunday at 6:30 p.m. until Tuesday at 6:30 p.m., and in the alternate weeks, every Monday after school until Tuesday morning before school. Mother’s plan also proposed joint decision-making authority.

On July 19, 2013, the trial court held a hearing on Mother’s petition to modify the Kentucky order. Mother testified that Father had an erratic work schedule, which made scheduling parenting time and the child’s extra-curricular activities very difficult. In fact, she claimed to be unable to coordinate with Father the seven-day periods required by the

¹ This order became final on December 16, 2011, when the Kentucky court entered an order setting child support obligations.

Kentucky order. Mother stated that Father's work schedule meant the child spent a majority of Father's parenting time with his paternal grandparents, which she maintained was not in his best interest. Mother was also concerned that the child spent too much time in the car traveling because of how far Father lived from the child's school and Mother's home. She claimed the child spent up to an hour each way driving from Father's home to school. Finally, Mother testified that the child has his own bedroom at her home and a half-sibling who also lived at Mother's home.

Father argued that Mother's petition amounted to a request for modification of custody because the Kentucky order did not designate a primary residential parent. Father testified that his work schedule sometimes required him to work evenings and weekends. When he worked late or on the weekends, his parents cared for the child at their home. Father admitted that when he worked late, he and the child frequently spent the night at his parents' home to avoid more driving time in the car. However, Father maintained that the commute from his home to the child's school or Mother's home was only "about 30 minutes." He stated that he tried to make the commute time "productive" by talking with the child or having the child read aloud. At both Father's home and the paternal grandparents' home, Father and the child shared a bedroom. Father claimed that the temporary parenting plan ordered by the trial court had worked well and that the child's best interests were served by spending equal time with his parents.

In its October 24, 2013 order, the trial court granted Mother's petition to modify. The trial court found that there had been a material change of circumstance under Tennessee Code Annotated § 36-6-101(a)(2)(C) based on the child's age and the parents' inability to coordinate a parenting schedule under the Kentucky order. When the Kentucky order was entered, the child was five. At the time the trial court ruled, the child was seven. The trial court concluded that the child now had more opportunities for extra-curricular activities and that the original order "was not working." The parties agreed that the child should remain in Williamson County Schools, and the court stated that the child should remain in the southern part of the county, where Mother lived, to avoid disruption to the child.

The trial court adopted Mother's proposed parenting plan with only a few modifications. Under the new parenting plan, the court granted Father 119 days and Mother 246 days. The parties retained joint decision-making authority, but the plan designated Mother as the primary residential parent. Father was granted parenting time every other Sunday at 6:30 p.m. until Wednesday morning at school drop-off. In the alternate week, Father would have parenting time on Tuesday at 3:30 p.m. until Wednesday morning at school drop-off. The parties were granted alternating two-week periods of parenting time during summer break and equal parenting time during Christmas break. The court made other minor changes regarding life insurance and parenting education requirements.

The court found that the new parenting plan was in the child's best interest. In its order, the court stated:

[T]he Court finds that both parents are good parents. The character of both these parents is strong. The love and affection that these parents have for [the child] is unquestioned.

The physical surroundings and environment, at least at this time, favors Mother. The child has a half-brother at Mother's home. Although it is not determinative, the Court finds that it is an appropriate consideration.

The child's performance in the school system is positive.

There is nothing in the record that supports that either parent is unable to financially provide for the child's needs.

The child is of an age now where his activities and extracurricular school events are in Williamson County, Tennessee and this factor favors Mother.

Continuity of placement is a neutral factor as both parents have been sharing equal time pursuant to the Court's prior Order.

On November 20, 2014, Father timely appealed the trial court's October 24, 2013 order.

II. ANALYSIS

Father raises three issues for our review: (1) whether the trial court erred in applying the more lenient standard applicable to changes in the residential schedule, rather than changes to the primary residential parent; (2) whether the trial court erred in finding that a material change in circumstance had occurred; and (3) whether the trial court erred in finding the modification to be in the child's best interest. In addition, Mother requests an award of reasonable attorney's fees incurred on appeal.

Courts apply a two-step analysis to requests to modify a permanent parenting plan. *See Armbrister v. Armbrister*, 414 S.W.3d 685, 697-98 (Tenn. 2013). The threshold issue is whether a material change in circumstance has occurred. *Id.* A change in circumstance with regard to a primary residential parent is "a distinct concept" from a change in circumstance with regard to residential parenting schedule. *Massey-Holt v. Holt*, 255 S.W.3d 603, 607 (Tenn. Ct. App. 2007); *see also* Tenn. Code Ann. §§ 36-6-101(a)(2)(B), -101(a)(2)(C) (2010).

If the parent requests a modification of the primary residential parent, which was formerly described as custody, then the parent must “prove by a preponderance of the evidence a material change in circumstance.” *Massey-Holt*, 255 S.W.3d at 607. A material change in circumstance in this context may “include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstance[] that make the parenting plan no longer in the best interest of the child.” Tenn. Code Ann. § 36-6-101(a)(2)(B). The change must have occurred after entry of the order sought to be modified, and the change must not have been reasonably foreseeable when the prior order was entered. *See, e.g., Caldwell v. Hill*, 250 S.W.3d 865, 870 (Tenn. Ct. App. 2007).

If the parent requests a modification of the residential parenting schedule, different criteria apply. *See, e.g., Rigsby v. Edmonds*, 395 S.W.3d 728, 734 (Tenn. Ct. App. 2012). The statute governing such requests “sets ‘a very low threshold for establishing a material change of circumstances.’” *Boyer v. Heimermann*, 238 S.W.3d 249, 257 (Tenn. Ct. App. 2007) (quoting *Rose v. Lashlee*, No. M2005-00361-COA-R3-CV, 2006 WL 2390980, at *2 n.3 (Tenn. Ct. App. Aug. 18, 2006)). Under Tennessee Code Annotated § 36-6-101(a)(2)(C), a parent must “prove by a preponderance of the evidence a material change of circumstance affecting the child’s best interest,” but “a showing of a substantial risk of harm to the child” is unnecessary. Tenn. Code Ann. § 36-6-101(a)(2)(C). A material change in circumstance in this context may include, but is not limited to:

significant changes in the needs of the child over time, which may include changes relating to age; significant changes in the parent’s living or working condition that significantly affect parenting; failure to adhere to the parenting plan; or other circumstances making a change in the residential parenting time in the best interest of the child.

Id. The change also must have occurred after entry of the order sought to be modified. *Caldwell*, 250 S.W.3d at 870. However, unlike the standard for a change of primary residential parent, it is irrelevant whether the change was reasonably anticipated when the prior order was entered. *Armbrister*, 414 S.W.3d at 703.

If there has been such a material change in circumstance, then the court must determine if a modification is in the child’s best interest by analyzing the factors found in Tennessee Code Annotated § 36-6-106(a) (2010). *Id.* at 697-98. Then, in step two of the analysis, the court must apply the fifteen factors found in Tennessee Code Annotated § 36-6-404(b) (2010)² to determine “how, if at all, to modify the residential parenting schedule.” *Id.* at 698; Tenn. Code Ann. § 36-6-405(a) (2010).

² In 2014, the General Assembly amended Tennessee Code Annotated § 36-6-404(b) by replacing its list of factors with the best interest factors found in Tennessee Code Annotated § 36-6-106(a). 2014 Pub. Acts __ (ch. 617, § 7). Even prior to the amendment, the analysis under the two statutes was “quite

A. Standard of Review

A trial court's determinations of whether a material change in circumstance has occurred and whether a modification of the parenting plan is in the child's best interest are factual questions. *Armbrister*, 414 S.W.3d at 692. We review the trial court's factual findings de novo upon the record, with a presumption of correctness, unless the evidence preponderates otherwise. *See* Tenn. R. App. P. 13(d); *id.* We review the trial court's conclusions of law de novo, with no presumption of correctness. *Armbrister*, 414 S.W.3d at 692.

“Determining the details of parenting plans is ‘peculiarly within the broad discretion of the trial judge.’” *Id.* at 693 (quoting *Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988)). We will not interfere with these decisions except upon a showing of abuse of that discretion. *See, e.g., Suttles*, 748 S.W.2d at 429. A trial court abuses its discretion only if it applies an incorrect legal standard; reaches an illogical conclusion; bases its decision on a clearly erroneous assessment of the evidence; or employs reasoning that causes an injustice to the complaining party. *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008); *see also Kline v. Eyrich*, 69 S.W.3d 197, 203-04 (Tenn. 2002); *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001). When reviewing a lower court's discretionary decision, we must determine: “(1) whether the factual basis for the decision is properly supported by evidence in the record; (2) whether the lower court properly identified and applied the most appropriate legal principles applicable to the decision; and (3) whether the lower court's decision was within the range of acceptable alternative dispositions.” *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010).

B. Standard Applicable to Petition to Modify

As an initial matter, we must determine if Mother's petition requests a modification of the residential parenting schedule or, as argued by Father, requests a modification of the primary residential parent designation. In Kentucky, parents are either granted sole custody or joint custody of their children. *See* Ky. Rev. Stat. Ann. §§ 403.270, 403.340 (2006); *Shafizadeh v. Bowles*, 366 S.W.3d 373, 375 (Ky. 2011). Unlike Tennessee, Kentucky does not require the designation of a primary residential parent. *See* Tenn. Code Ann §§ 36-6-402(5) (2010), -404(b). However, a parent may be designated as the primary residential custodian by agreement of the parties or by a trial court after conducting a best interest analysis. *See Fenwick v. Fenwick*, 114 S.W.3d 767, 778 (Ky. 2003), *overruled on other grounds by Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008); *Chappell v. Chappell*, 312 S.W.3d 364, 366-67 (Ky. Ct. App. 2010).

similar.” *See Armbrister*, 414 S.W.3d at 697. The pre-2014 version of Tennessee Code Annotated § 36-6-404 is applicable to this matter.

Although the Kentucky order did not specify who had custody of the child, Father did not offer into evidence the Decree of Dissolution of Marriage of May 6, 2007, entered by the Kentucky court. Consequently, we cannot verify the Kentucky court's decision on custody. However, at the July 19, 2013 hearing on Mother's petition to modify, Father testified as follows:

[The Court]: Who was designated the primary residential parent if there was such a designation in Kentucky in the initial divorce?

[Father]: I believe it was the mother.

[The Court]: Let me ask this, had that designation ever changed, the mother as the primary residential parent?

[Father]: Not to the best of my knowledge, Your Honor.

Based on Father's testimony, we conclude either that the Kentucky court, after conducting a best interest analysis, or the parties, by agreement, designated Mother as the primary residential custodian. Therefore, Mother's petition to modify and her proposed permanent parenting plan did not request a change in the primary residential parent. Rather, the petition requested a change in the residential parenting schedule. Accordingly, the trial court appropriately applied the less-demanding material change of circumstance standard found in Tennessee Code Annotated § 36-6-101(a)(2)(C).

C. Finding on Material Change in Circumstance

In order to adjust Father's parenting time from a previous order, there must be a predicate finding of a material change in circumstance since the prior final order. *See, e.g., Hyde v. Bradley*, No. M2009-02117-COA-R3-JV, 2010 WL 4024905, at *3 (Tenn. Ct. App. Oct. 12, 2010) (explaining that the court considers whether modification of the current parenting schedule is in the child's best interests only after a determination that there has been a material change in circumstance); *In re M.J.H.*, 196 S.W.3d 731, 742 (Tenn. Ct. App. 2005) (“[A] change in circumstances is measured from the *final* order of custody under which the parties are operating.”). Father claims that the Kentucky order did not become final until December 16, 2011, which was the same day Mother filed her petition to register a foreign decree and to modify. Father argues, therefore, that there could have been no material change in circumstance since the prior final order at the time the petition was filed.

We find Father's argument unavailing. Assuming for the sake of argument that the previous order was final on December 16, 2011, the trial court considered whether a material change in circumstance had occurred since that date. In doing so, the trial court found a material change of circumstance under Tennessee Code Annotated § 36-6-

101(a)(2)(C) as a result of the child's age and the impracticality of the Kentucky order. Particularly as to the child's age, the court found that the child has increased opportunities and extra-curricular activities, most of which occur closer to Mother's home.

Tennessee Code Annotated § 36-6-101(a)(2)(C) specifically mentions the child's age and the parties' failure to adhere to a parenting plan as a material change in circumstance. Tenn. Code Ann. § 36-6-101(a)(2)(C). There is no dispute that the child is now older than he was at the time the Kentucky Order became final, nor is there a dispute that he is now more involved in extra-curricular activities. Similarly, the parties do not dispute that the Kentucky order was unworkable. At trial, the following exchange occurred:

[Father's attorney]: "Your Honor, we are just trying to show a course of conduct having to do with why that plan—Kentucky plan no longer works."

[The Court]: "I think everybody agrees the Kentucky plan no longer works. Do you disagree with that, [Mother's attorney]?"

[Mother's attorney]: "No, Your Honor."

[The Court]: "We all agree."

Additionally, both Father and Mother introduced several exhibits and testified in detail about the other parent's lack of cooperation in agreeing to parenting time under the Kentucky order. Therefore, we cannot conclude that the evidence preponderates against the trial court's finding of a material change in circumstance.

D. Best Interest of the Child

After finding that there had been a material change of circumstance under Tennessee Code Annotated § 36-6-101(a)(2)(C), the trial court considered whether a modification of the residential parenting schedule was in the child's best interest. Although the trial court did not specifically reference the best interest factors in Tennessee Code Annotated § 36-6-106(a), its findings demonstrate a consideration of the relevant factors. The trial court found that the child has increased opportunities for extra-curricular activities, should remain in Williamson County Schools, and that the Kentucky plan was unworkable. Therefore, the court concluded that a modification of the parenting schedule was in the child's best interest. The evidence does not preponderate against that finding.

Next, the trial court considered how to modify the residential parenting schedule. In doing so, it made specific factual findings regarding the child's best interest. Although

it did not enumerate those considerations with corresponding statutory references, we are able to correlate the findings with the factors found in Tennessee Code Annotated § 36-6-404(b). Because the limitations of Tennessee Code Annotated § 36-6-406 were not applicable in this case, the trial court appropriately considered the following factors in Tennessee Code Annotated § 36-6-404(b):

(5) The disposition of each parent to provide the child with food, clothing, medical care, education, and other necessary care;

....

(7) The love, affection, and emotional ties existing between each parent and the child;

(8) The emotional needs and developmental level of the child;

(9) The character and physical and emotional fitness of each parent as it relates to each parent's ability to parent or the welfare of the child;

(10) The child's interaction and interrelationships with siblings and with significant adults, as well as the child's involvement with the child's physical surroundings, school, or other significant activities;

....

(16) Any other factors deemed relevant by the court.

Tenn. Code Ann. § 36-6-404(b).

After reviewing the record, we cannot conclude that the trial court abused its discretion by ordering the new parenting plan. The trial court saw the witnesses and is in a better position to make credibility determinations and evaluate the child's needs. *See, e.g., Rousos v. Boren*, No. M2013-01568-COA-R3-CV, 2014 WL 4217415, at * 11 (Tenn. Ct. App. Aug. 26, 2014) (citing *Massey-Holt*, 255 S.W.3d at 607). "[T]he specific modifications a trial court adopts to address a material change in circumstances and to serve the best interests of children are the kinds of details an appellate court should not 'tweak' absent an abuse of discretion." *Armbrister*, 414 S.W.3d at 706 (quoting *Eldridge*, 42 S.W.3d at 88) (finding that the trial court did not err by adjusting the number of days granted to Father from 85 to 143).

The record supports the trial court's determinations that factors (5), (7), and (9) weigh equally in favor of Mother and Father. As to factor (5), there was no evidence in the record that either parent is unable to financially provide for the child's needs. The

parents love their child and both Mother and Father have obvious emotional ties with the child, so factor (7) is neutral. Factor (9) also weighs equally in favor of Mother and Father because both parents are fit to care for the child. The trial court also considered the “continuity of placement” as an additional factor under Tennessee Code Annotated § 36-6-404(a)(16). The court found that consideration was also a “neutral factor as both parents have been sharing equal time pursuant to the Court’s prior Order.”

Although many of the best interest factors in this case weighed equally in favor of both parents, three factors weighed significantly in favor of Mother: (1) the physical surroundings and half-sibling at Mother’s home would benefit the child; (2) the child would be primarily supervised by his paternal grandparents during Father’s parenting time; and (3) the lengthy commute to school each day from Father’s home would be detrimental to the child. The child has his own bedroom at Mother’s home. See *Cranston v. Combs*, 106 S.W.3d 641, 646 (Tenn. 2003) (considering the child’s separate bedroom as part of the best interest analysis), *superseded by statute, as stated in, Armbrister*, 414 S.W.3d at 685. Increased time with Mother also permitted increased time with the child’s half-sibling. See *In re Jayden C.*, No. M2014-00957-COA-R3-JV, 2015 WL 1384346, *4 (Tenn. Ct. App. Mar. 23, 2015) (concluding that the presence of a half-sibling at a parent’s home weighs in favor of that parent). As the trial court noted, the presence of a family member is not “the end-all, be-all,” but it is an important factor when considering the child’s best interest.

Unlike Mother, Father heavily relied on his parents to provide care for the child while Father was at work. “While [Father] can certainly share his parenting time with third parties such as grandparents, the child’s time with [his] other parent, [Mother], should not be diminished in favor of time with such third parties rather than [his] father.” *McDaniel v. McDaniel*, No. W2007-01587-COA-R3-CV, 2008 WL 5263605, *7 (Tenn. Ct. App. Dec. 18, 2008) (considering the child’s best interest when the child primarily spent Father’s parenting time with her grandparents or Father’s girlfriend). We note that this consideration alone is also not determinative of the residential parenting schedule, but it is a relevant factor to be considered.

Finally, we must consider the effect of the commute from Father’s home to school on the child. See *Fox v. Gwirtsman*, No. M2004-00664-COA-R3-CV, 2005 WL 2140851, *5 (Tenn. Ct. App. Sept. 6, 2005) (considering the effect of a lengthy commute from a parent’s home to the child’s school in the best interest analysis). If the parties exercised equal parenting time, as ordered by the Kentucky order and the temporary parenting plan, the child could spend up to ten hours a week driving from Father’s home to school during Father’s parenting time.³ Under the parenting plan ordered by the court,

³ When the parties first relocated to Tennessee, Mother and Father lived approximately 60 miles apart. After Father’s move in 2012, the parties now live approximately 30 miles apart. The parties testified that the commute from Father’s home to the child’s school is between thirty minutes to one hour each way.

the child will commute from Father's home to school three days every other week, for a maximum of six hours one week and two hours during the alternate week. Regardless of how the parties arrived at this situation, we cannot ignore the potential effects of such a significant commute on the child. The trial court's order adequately balances the statutory command to maximize a parent's participation in the life of his child given the parents' locations and the best interest of the child. Tenn. Code Ann. § 36-6-106(a).

Although a parent may feel the trial court's outcome is unjust, the focus of every parenting plan review is the best interest of the child. *See, e.g., Culbertson v. Culbertson*, 393 S.W.3d 678, 685 (Tenn. Ct. App. 2012). The trial court had to make the difficult decision of allocating parenting time between two good parents. The record indicates that Father is an attentive and involved parent, and we commend him for that. But, we must keep in mind that "[t]he needs of the children are paramount; the desires of the parents are secondary." *Shofner v. Shofner*, 181 S.W.3d 703, 715-16 (Tenn. Ct. App. 2004). "Parenting plans should never be used to punish or reward the parents for their human frailties or past mis-steps, but rather they should be used to advance the children's best interests by placing them in an environment that best serves their physical and emotional needs." *Id.* (citations omitted).

Our role is not to "tweak a visitation order in the hopes of achieving a more reasonable result than the trial court." *Eldridge*, 42 S.W.3d at 88. The trial court applied the correct law, the evidence does not preponderate against its factual findings, and its decision is within the range of acceptable alternative dispositions. *See Lee Med.*, 312 S.W.3d at 524. Therefore, we affirm the judgment of the trial court.

E. Attorney's Fees

Pursuant to Tennessee Code Annotated § 36-5-103(c) (2014), appellate courts have discretion to award a prevailing party fees incurred on appeal. *Pippin v. Pippin*, 277 S.W.3d 398, 407 (Tenn. Ct. App. 2008); *Shofner*, 181 S.W.3d at 719. We consider the following factors in our decision to award fees: (1) the requesting party's ability to pay the accrued fees; (2) the requesting party's success in the appeal; (3) whether the requesting party sought the appeal in good faith; and (4) any other relevant equitable factors. *Hill v. Hill*, No. M2006-02753-COA-R3-CV, 2007 WL 4404097, at *6 (Tenn. Ct. App. Dec. 17, 2007). In light of these factors, we decline to award Mother her attorneys' fees incurred on appeal.

III. CONCLUSION

Because we conclude that the trial court applied the appropriate standard of law, the evidence does not preponderate against the trial court's findings, and the court did not abuse its discretion, we affirm the judgment of the trial court.

W. NEAL McBRAYER, JUDGE